NOS. 83-943, 83-1030 and 83-1119

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IN THE

Supreme Court of the United States

October Term, 1983

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,
Petitioners,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

RYDER TRUCK LINES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS,
Petitioner,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CONSOLIDATED BRIEF IN OPPOSITION FOR RESPONDENTS THE PRIVATE CARRIER CONFERENCE, INC. AND THE NATIONAL-AMERICAN WHOLESALE GROCERS' ASSOCIATION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Since the passage of the Motor Carrier Act of 1935, the Interstate Commerce Commission periodically has been called upon to decide cases and establish rules and policy construing the parameters of private carriage exempt from the Commission's economic jurisdiction. In the instant case, the ICC has announced a new policy for determining whether a particular transportation leasing arrangement constitutes private carriage. Three Petitions for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit have been filed challenging the Commission's policy statement. In the interest of judicial efficiency, Respondents requested and were granted authority to file a consolidated response to the Petitions for Writ of Certiorari. Respondents pose the following questions which adequately cover the questions presented by Petitioners:

1. Whether the Eleventh Circuit, in exercising its function of judicial review, appropriately upheld the Commission's new policy statement as a permissible and rational exercise of the Commission's regulatory authority and responsibility?

2. Whether there is, in fact, a real conflict between the Court of Appeals for the Fifth and Eleventh Circuits concerning the permissible scope of the National Transportation Policy?

3. Whether the Commission's new policy statement is consistent with this Court's decision in *United States* v. *Drum* which acknowledged the evolving nature of the test utilized by the Commission to distinguish private from for-hire carriage?

THE PARTIES

Respondents adopt the list of parties set forth in the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit filed by the American Trucking Associations, Inc., No. 83-943 (hereinafter referred to as "ATA's Pet. App."). To that List, Respondents would add the following descriptive information.

IDENTIFICATION OF THE PRIVATE CARRIER CONFERENCE, INC.

The Private Carrier Conference, Inc. ("PCC" or "the Conference") is a national, non-profit trade association with a membership of more than 4,000 manufacturers, distributors, processors and retailers who operate motor trucks incidental to and within the scope of their non-transportation primary business endeavors. Also included in PCC's membership are other national trade associations, truck equipment and component manufacturers, vehicle and driver leasing companies and other business firms supporting private carriage. PCC is an independent, separately chartered organization affiliated with the American Trucking Associations, Inc. PCC speaks for private motor carriers on all issues of concern.

IDENTIFICATION OF THE NATIONAL-AMERICAN WHOLESALE GROCERS' ASSOCIATION

The National-American Wholesale Grocers' Association (NAWGA) is a national trade association representing nearly 400 independent wholesale grocers and food service distributors. These companies, both large and small, supply grocery products and provide a wide array of services to retail grocery stores, hospitals, schools, restaurants and other food service establishments throughout the United States. Marketing products from over 800 separate distribution centers, NAWGA member companies account for nearly $50 billion of the nation's grocery product volume and one-third of the groceries distributed nationally. NAWGA's food service division, the International Food Service Distributors' Association, represents

member firms who sell annually over $10 billion in food and related products to the institutional, away-from-home food service market. NAWGA's member firms maintain extensive private carriage fleets to transport goods in furtherance of their non-transportation primary business endeavors. They implement such private carriage via reliance upon directly employed and/or leased drivers.

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The Private Carrier Conference, Inc. ("PCC") and the National-American Wholesale Grocers' Association ("NAWGA") (hereinafter referred to as "Respondents") respectfully submit this Consolidated Brief in Opposition to the Petitions for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit to review that Court's decision in *Ryder Truck Lines, Inc.* v. *United States*, 716 F.2d 1369 (1983). The Eleventh Circuit upheld the ICC's establishment of a new policy

for determining whether a particular transportation leasing arrangement constitutes for-hire or private carriage. This "Consolidated Brief in Opposition to Petitions for Writ of Certiorari" is submitted pursuant to Rule 22 of the Supreme Court's Rules.[1]

COUNTERSTATEMENT OF THE CASE

The matter currently before this Court stems from a consolidation, by the Eleventh Circuit, of two Petitions for Review of the Interstate Commerce Commission's decision in Ex Parte No. MC-122 (Sub. No. 2), *Lease of Equipment and Drivers to Private Carriers*, 132 M.C.C. 756 (1982) (hereinafter referred to as "*Single-Source Leasing*").

The Motor Carrier Act of 1935, as amended, recognizes the right of shippers to transport their own goods in bona fide private carriage.[2] In numerous cases, however, the Commission has been called upon to determine the factors giving rise to the demarcation between private carriage and for-hire carriage. When a shipper owns equipment and relies upon its own driver employees for the transportation of its goods pursuant to and in furtherance of its primary non-transportation business, the movement accomplished is bona fide private carriage exempt from the Commission's economic regulation.

While a shipper's lease of a driver and vehicle from this same source or from separate, unrelated sources will give rise to a presumption that the shipper has purchased a for-hire carriage service, the presumption is rebuttable. It will be overcome by demonstrating that the shipper has maintained and exerted exclusive dominion and control over the use of both instrumentalities of carriage, *i.e.*, vehicle and driver. *Personnel*

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[1] All parties seeking Supreme Court review in the instant proceedings shall hereinafter be collectively referred to as "Petitioners."

[2] Private carriage is defined as transportation of one's own goods within the scope of and in furtherance of one's primary business, other than transportation. 49 U.S.C. § 10524(a). The private carrier is exempt from economic regulation. Conversely, for-hire (regulated) motor carriers are "motor common carriers," 49 U.S.C. § 10102 (13), and/or "motor contract carriers," 49 U.S.C. § 10102 (14).

Service, Inc.–Investigation of Operations and Practices, 110 M.C.C. 695 (1969), *aff'd, National Motor Freight Traffic Association* v. *United States*, Civil No. 339-71 (D.D.C. June 27, 1972), *aff'd by order*, 409 U.S. 1094 (1973).

Indeed, in *Personnel Service*, a decision admittedly involving separate-source leasing, the drivers in question remained on the payroll of the lessor. Notwithstanding that fact, the Commission was satisfied that sufficient control over the drivers vested in the lessee to sustain a finding of private carriage. Hence, if the facts arising in a single-source context were fully analogous to those in *Personnel Service*, there would be no reason for reaching a distinguishable result.

The standard for assessing the impact of vehicle and driver leases on a lessee's claim to private carrier status had evolved in *United States* v. *Drum*, 368 U.S. 370 (1962).[3] Therein, this Court noted that the Commission had moved away from the control test as the sole criterion for measuring the lawfulness of an alleged private carriage operation. Rather, the Commission had supplemented its control standard with a test of substance.[4] Control was merely one of the responsibilities which private carriers were expected to undertake. Other responsibilities included assumption of liability to the public, bearing the risk of profit or loss on the transportation operation, and commitment of finances to the transportation venture.

Drum and subsequent judicial and administrative decisions continued to recognize the need for the Commission's

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[3] The decision in *United States* v. *Drum*, 368 U.S. 370 (1962), affirmed the ICC's decision in *Oklahoma Furniture Mfg. Co.–Investigation of Operations*, 79 M.C.C. 403 (1959).

[4] The courts have commonly articulated their plotting of the boundary between private and for-hire carriage in leased equipment cases in terms of overall substance, rather than simply in terms of "control." *See Georgia Truck System, Inc.* v. *ICC*, 123 F.2d 210, 212 (5th Cir. 1941) ("[A]ppellant, in substance and in reality, operates a transportation business."); *A. W. Stickle & Co.* v. *ICC*, 128 F.2d 155, 161 (10th Cir. 1942), *cert. denied*, 317 U.S. 650 (test of "substance and reality"); *Lamb* v. *ICC*, 259 F.2d 358, 360 (10th Cir. 1958) ("Simply stated [the issue] . . . is who was transporting the goods in question."); *B&C Truck Leasing, Inc.* v. *ICC*, 283 F.2d 163, 165 (10th Cir. 1960) (test of "substance and effect").

flexibility in the face of changing circumstances. For example, in *Agricultural Transportation Association of Texas* v. *King*, 349 F.2d 873, 883 (5th Cir. 1965), the Fifth Circuit noted:

> . . . *Drum* makes two . . . things clear. The first is that *the test* fashioned continuously by the authoritative policy making agency, the ICC, *is an evolving one* (Emphasis added).

Significantly, the judicially-approved ICC policies did not negate the possibility of private carrier utilization of owner-operators or other single-source lessors.[5]

In the instant case, the Commission, ever cognizant of recent changes in regulatory policy and statutory direction, reassessed its approach to delineating between private and for-hire carriage. After reviewing approximately 155 comments filed in response to its proposed policy statement, the Commission noted:

> In making individual determinations, *we will focus on the elements of control, responsibility, and performance of the key organizing and management functions* of a transportation company as the critical elements in evaluating the character of the service provided. We will, however, no longer employ the rebuttable presumption announced in *H.B. Church Truck Service Co. Com. Car. Application*, 27 M.C.C. 191 (1940),

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[5] To overcome the presumption of for-hire carriage raised by single-source leasing, shippers generally perceived the need to: (1) place owner-operators on their payrolls; (2) undertake the risk of loss of non-utilization of equipment and drivers; (3) reimburse owner-operators for expenses such as tolls and fuel taxes; and (4) maintain strict control over the vehicles, drivers and overall carriage performed. *See Ontario Company-Declaratory Order*, 112 M.C.C. 211 (1970), and *Rayette, Inc.–Investigation of Operations*, 108 M.C.C. 410, 416 (1969). While the ICC's view continued to evolve, many who desired to accomplish private carriage were still dissuaded from utilizing owner-operators and other single-source lessors because of the severe burden of proof and related structural and operational limitations.

> *infra*, that leases of equipment with drivers to shippers ordinarily give rise to for-hire transportation by the lessor[6] (Emphasis added).

Single-Source Leasing recast the essence of private carriage by defining control and substantive burdens in terms of the *assumption of responsibility to the public.*[7] Significantly, the obligations which a private carrier will be expected to assume when it leases vehicles and drivers from a single source now will be akin to the responsibilities assumed by regulated carriers who historically have engaged in single-source leasing under the lease and interchange regulations contained in 49 C.F.R. § 1057. Section 1057.12(d)(1) provides in relevant part that "the authorized carrier lessee shall assume *complete responsibility* for the operation of the equipment for the duration of the lease." (Emphasis added). In *Single-Source Leasing*, the Commission has now established:

> When a private carrier furnishes service in vehicles owned and operated by others, it must control the service to the same extent as if it owned the vehicles, but need control the vehicles only to the extent necessary to be responsible to

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[6] *See* Ex Parte No. MC-122 (Sub. No. 2), *Lease of Equipment and Drivers to Private Carriers*, 132 M.C.C. 756, 758 (1982); ATA's Pet. App., Appendix A at 4a.

[7] The Commission will now presume that private carriage exists in the context of a single-source leasing arrangement where the lessee-shipper is capable of demonstrating:

(1) that the lessor has committed the equipment to the lessee's exclusive use for the term of the lease;

(2) that the lessee assumes exclusive dominion and control over the service;

(3) that the lessee maintains public liability insurance and assumes full liability to the public for injuries caused in the performance of private carriage;

(4) that the lessee assumes responsibility for compliance with safety regulations;

(5) that the lessee, with the exception of negligence on the part of the lessor, bears the responsibility for cargo liability; and

(6) that the term of the lease is at least thirty (30) days.

the public and the Department of Transportation. 132 M.C.C. at 777.

The ICC now discounts to a substantial degree the need for the stringently protectionist policies which it had previously administered in the regulated sector's favor. Therefore, the ICC believes it is justified in removing the onus of discrimination from the shoulders of private carriers[8] who seek to avail themselves of transportation factor inputs, *i.e.*, drivers and vehicles, furnished by single-source lessors.

In *Ryder Truck Lines*, the Eleventh Circuit upheld the Commission's policy statement in *Single-Source Leasing* as a rational and permissible exercise of the Commission's regulatory authority. Upon failing to obtain the desired relief from the Eleventh Circuit, Petitioners now seek to have this Court substitute its judgment for that of the ICC and the Eleventh Circuit.

REASONS FOR DENIAL OF THE WRITS

A. THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES

A substantial portion of Petitioners' arguments raised in support of granting certiorari merely amount to a general disagreement with the Eleventh Circuit's affirmance of the ICC policy statement. Petitioners apparently believe that the Supreme Court is simply a tribunal of errors and appeals, a belief clearly contrary to this Court's constitutional mission. For example, Petitioners in Case No. 83-943 ("ATA") contend that the case is of "exceptional national importance." Their arguments, however, are more appropriately reserved for a brief on

[8] The ICC recognized that interstate private carriers outnumber their regulated counterparts by a ratio of better than 9 to 1. The Commission further acknowledged that private carriers are responsible for transporting approximately 40 percent of the freight hauled interstate. *See* "Issues in Regulating Interstate Motor Carriers," published by U.S. General Accounting Office (June 20, 1978) at 13.

the merits. Notwithstanding, the arguments are premised on speculative and exaggerated fears that *Single-Source Leasing* will, necessarily, adversely impact regulated carriers. Specifically, ATA maintains that "the agency record contains substantial evidence of freight diversion from regulated motor carriers to single-source leasing arrangements." ATA's Pet. App. Case No. 83-943, at 5 n. 3. However, Petitioners' diversion of traffic argument ignores recent Congressional and Commission initiatives designed to increase competition in the motor carrier industry. One pertinent example is Section 10922(b) (2) (B), 49 U.S.C. § 10922(b) (2) (B), which prohibits the Commission from denying applicants authority on the grounds that such applicants, if successful, would divert revenues from existing carriers.

More importantly, the diversion argument disregards the dynamics of single-source leasing and existing marketplace realities. Given the liberalized market entry procedures established by the ICC, new carriers are proliferating in the market and thereby increasing competition consistent with the public interest, notwithstanding the fact that some diversion of revenues from existing carriers is occurring.[9]

Congress has concurred in the need for productivity and efficiency through competition in all sectors of the surface transportation industry, *regulated and unregulated* alike, regardless of any potential diversion of traffic from regulated carriers. This is confirmed by Section 9 of the Motor Carrier Act of

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[9] Viewed in its proper perspective, the decision announced in *Single-Source Leasing* is a logical and totally predictable extension of the regulatory reform initiatives which have been implemented by the Commission, the courts and Congress over the past five years. The genesis of such revised regulatory priorities may be found in *Toto Purchasing and Supply Company, Inc. Common Carrier Application*, 128 M.C.C. 873 (1978), *aff'd, Mercury Motor Express, Inc.* v. *United States*, 648 F.2d 315 (5th Cir. 1981). Therein, the Fifth Circuit upheld the ICC's conclusion that elimination by private carriers of empty return (backhaul) movements and resulting stimulation of productivity and fuel-efficiency were more important to the public interest than rigid protection against competition and possible diversion of traffic. The *Toto* decision allowed shippers to supplement their existing private carrier operations with incidental for-hire regulated authority.

1980, 49 U.S.C. § 10524(b) and (c), which exempts from ICC regulation Compensated Intercorporate Hauling ("CIH").[10]

Under its claim of "exceptional national importance," ATA has advanced numerous arguments which should be summarily dismissed for three reasons. First, ATA has either misstated the facts[11] or made a quantum jump from existing facts[12] to an illogical conclusion.[13] Second, the Commission

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[10] H.R. Rep. No. 1069, 96th Cong., 2d Sess. 21-22, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2283, 2303-04. CIH is interstate motor transportation conducted between and among a parent and its wholly-owned subsidiaries. Congress anticipated that private carriers could minimize operational inefficiency by performing transportation services on behalf of shippers within their respective corporate families.

[11] Petitioners in No. 83-943 assert that "under the Eleventh Circuit's decision, a shipper's transportation subsidiary, which is less than 100 percent affiliated with its parent or sister companies, can engage in [CIH] simply by utilizing the device of a single-source leasing arrangement." According to Petitioners, the private carrier could now accomplish indirectly what it could not do directly. ATA's Pet. App., Case No. 83-943 at 8. This statement graphically demonstrates Petitioners' serious misreading of *Single-Source Leasing*. When a less than wholly-owned trucking subsidiary leases drivers and equipment to the parent under a valid single-source leasing arrangement, the concept of CIH never arises. Rather, the trucking subsidiary is acting as a lessor of factor inputs, *i.e.*, drivers and vehicles, and not as a carrier. Moreover, the shipper/parent company is engaging in private carriage; that is, it is taking on much more responsibility than that normally borne by a mere shipper in that it is assuming control over and responsibility for the performance of the transportation operation.

[12] Petitioners also assert that there will be a mass exodus of owner-operators from the regulated to private carrier sector. This assumption is grossly incorrect. Rather, the increased flexibility and new sources of revenue which the decision in *Single-Source Leasing* offers owner-operators will encourage the establishment of new owner-operators. Because the universe of owner-operators will expand, it would be totally inaccurate to suggest that every potential decision by an owner-operator to contract with a private carrier will result in a corresponding loss of access by a regulated carrier to the owner-operator's resources.

[13] An equally meritless claim advanced by Petitioners is that single-source leasing encourages regulated carriers to voluntarily seek revocation of their operating authority and thereafter function as single-source lessors. This claim assumes that regulated carriers and single-source lessors are

and the Eleventh Circuit have reviewed these allegations in detail, have rejected the same and have provided a sound basis for their conclusions. Third, review of Petitioners' speculative arguments would inappropriately transform this Court into a tribunal of errors and appeals.

Petitioners in Case No. 83-943 and Petitioner in Case No. 83-1119 ("NARUC") seem to share the same problem, namely, how to demonstrate exceptional national importance without resorting to factually incorrect statements, or egregious jumps in logic. NARUC contends that the new criteria will create an enforcement nightmare for the forty-one participating states. It maintains that since the Commission does not require a written lease, state officials at various road check points cannot make the necessary on the spot determinations as to whether one is performing legitimate private carriage or purchasing unlicensed for-hire transportation service. NARUC simply ignores the obvious. Should they entertain any doubts as to the bona fides of a trucking operation, state officials at various check points may cite the driver in question for a violation and compel him to demonstrate at a later hearing proof of the legitimacy of the operation. Notwithstanding, NARUC argues that the state's inability to make this instant determination warrants Supreme Court review. Case No. 83-1119, NARUC's Pet. App. at 8-13.

NARUC attempts to create the impression that private carrier single-source leasing under the new policy test creates a new or different enforcement problem for the states. Significantly, the Commission has never required a written lease when a private carrier leased a vehicle from one source and a driver from another. While separate source leasing raises the same kinds of state enforcement questions associated with single-source leasing, historically, NARUC has not complained of

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engaged in interchangeable business ventures, that is, one is a complete substitute for the other with the determining factor being the highest revenue potential. This simplistic approach demonstrates Petitioners' inability to perceive that the lessee of a driver and vehicle furnished by the same source must *itself* convert those factor inputs into carriage before it will be found to be conducting private carriage.

enforcement concerns in regard to separate source leasing. Moreover, NARUC's argument ignores the commercial realities of single-source leasing. Even though the Commission does not formally require a written lease, sound business practice mandates execution of a written lease to protect all parties concerned. Indeed, many states will require that copies of vehicle leases be filed with the state public utility commission and/or retained in the cab of the leased equipment.

B. THE ALLEGEDLY CONFLICTING COURT OF APPEALS' DECISIONS OF THE FIFTH AND ELEVENTH CIRCUITS ARE DISTINGUISHABLE ON THEIR FACTS

Knowing that an irreconciliable conflict between decisions of courts of appeals will enhance, if not ensure, Supreme Court review, Petitioners in Case No. 83-943 engage in a bit of creative analysis to manufacture a conflict between the Fifth and Eleventh Circuits. Apparently, Petitioner in Case No. 83-1030 ("Ryder") supports this conflict theory. However, judging from Ryder's superficial treatment of this point, one can only assume that it was unwilling to commit itself. NARUC either does not support the conflict theory or simply neglects it. In any event, ATA contends that the conflict exists between the Eleventh Circuit's decision in *Single-Source Leasing* and a recent decision rendered by the Fifth Circuit in *Central Forwarding, Inc. v. ICC*.[14] Respondents submit that no such conflicts exists and that the decisions are distinguishable on their facts.

In *Central Forwarding*, the Fifth Circuit concluded that the Commission lacked the statutory authority to regulate compensation paid by carriers to owner-operators. Specifically, the Fifth Circuit held that the Commission could not base its rulemaking authority to promulgate the regulation in question on the National Transportation Policy ("NTP"), 49 U.S.C. § 10101(a) (7).

Although acknowledging this Court's decision in *American Trucking Associations v. United States*,[15] wherein it was stated

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[14] 698 F.2d 1266 (1983).

[15] 344 U.S. 298 (1953).

that the ICC could regulate certain leasing practices between carriers and owner-operators despite the lack of any express delegation of power under the Interstate Commerce Act, the Fifth Circuit concluded that the decision did not grant *carte blanche* authority to the Commission over all leasing practices. Specifically, the Fifth Circuit concluded:

> The wording of the statute [NTP], the case law and the legislative history all point to the conclusion that the [NTP] . . . does not grant the ICC authority to regulate compensation paid by carriers to owner-operators.[16]

In light of the foregoing, certain Petitioners maintain that "the Fifth Circuit's decision respecting the reach of the NTP cannot be squared with the Eleventh Circuit's decision on the same matter."[17]

These decisions are distinguishable on their facts. In *Central Forwarding*, the Fifth Circuit concluded that the NTP did not give the Commission rulemaking authority to regulate compensation paid by carriers to owner-operators. The Fifth Circuit's inquiry into the scope of the NTP was to determine *whether it provided an independent basis for rule making authority*. The Fifth Circuit concluded that the NTP did not.[18] In short, *Central Forwarding* was an attempt by the Commission to employ the NTP as an independent foundation for rulemaking authority.

Conversely, in *Ryder Truck Lines*, the Commission asserted that its change in policy was consistent with the NTP. There was no attempt to employ the NTP as an independent source for its policy statement, as was the case in *Central Forwarding, supra*. As an expert administrative agency with respect to

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[16] 698 F.2d at 1281.

[17] Case No. 83-943, ATA's Pet. App. at 11.

[18] The inherent flaw in Petitioners' assertion is demonstrated by the following point, to wit: There is nothing in the Eleventh Circuit's decision from which one could reasonably conclude that it would have decided *Central Forwarding* any differently than the Fifth Circuit, or, on the other hand, that the Fifth Circuit would have reached a contrary decision in the single-source leasing case based on its decision in *Central Forwarding*.

transportation issues, the ICC possesses the necessary regulatory authority to promulgate a policy addressing the demarcation between for-hire and private carriage. In this respect the Eleventh Circuit was attempting to ascertain whether the policy statement was a reasonable exercise of the Commission's demonstrated regulatory authority.

The Eleventh Circuit decided that changes in the nature of the trucking industry, attendant reduced need for protection of regulated carriers from encroachment by private carriers, and policy changes focusing on ease of entry and increased competition in the transportation industry provided rational bases for the ICC's policy statement and established a more practical approach for defining unregulated private carriage.

At the heart of Petitioners' conflict theory is the often rejected notion that the NTP only applies to regulated carriage. Apparently, Petitioners believe that the Fifth Circuit's decision in *Central Forwarding* supports this proposition. Contrary to Petitioners' theory, the Fifth Circuit did not forbid the Commission from considering the effect of its rules on the unregulated sector; it only held that the NTP does not act as an independent source of rule-making authority. Indeed, Petitioners' theory is inconsistent with the Fifth Circuit's decision in *Mercury Motor Express Inc.*, which held that a measure initiated by the ICC to improve both private and regulated carriage was consistent with the NTP. In short, there is simply no real conflict between the opinions of the Fifth and Eleventh Circuits. Moreover, much of the language relied upon by Petitioners to support their conflict argument is dictum.

C. THE NEW POLICY STATEMENT IS CONSISTENT WITH THE VIEW ADOPTED IN THE *DRUM* DECISION THAT THE TEST FOR DISTINGUISHING PRIVATE FROM FOR-HIRE CARRIAGE IS AN EVOLVING STANDARD

To bolster their request for Supreme Court review, Petitioners, in unison, assert that there is a conflict between the Eleventh Circuit's decision in *Single-Source Leasing* and this Court's decision in *Drum*.[19] In fact, no conflict exists. Rather,

[19] 368 U.S. 370 (1962).

the asserted conflict is rooted in the Petitioners' inartful analysis of the *Drum* decision and their obvious desire to secure Supreme Court review.

In *Drum*, this Court upheld the Commission's findings that appellees who leased their motor vehicles in connection with their services as drivers were conducting for-hire carriage. The Commission concluded that the lessees were able to emancipate themselves, in significant measure, from the characteristic burdens of private carriage.

In essence, the Supreme Court was in complete agreement with the Commission with respect to the test established, the rationale underlying the test and the Commission's application of the test to the facts outlined in *Drum*. This court reiterated that *the demarcation between private and for-hire carriage is left to the Commission's expertise*, and that the *Drum* case "is a recent instance of the Commission's developing technique of decision."[20] In *Single-Source Leasing*, the Commission has sought to further redefine its test for private carriage.

ATA asserts that the "Eleventh Circuit misinterpreted *Drum* when it failed to recognize that an employment relationship is a fundamental burden a shipper must assume under the substance test. . . ." First, contrary to Petitioners' contention, the asserted employment relationship goes to the "control" inquiry–not the "substance" inquiry. More importantly, the Commission has always articulated the inquiry in terms of *control*–not employment. If the two are identical, as the Petitioners would have this Court believe, then why not simply articulate the test in terms of employment?[21] The inescapable

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[20] *Id.* at 374.

[21] If Petitioners' position were correct, then there would be absolutely no benefit in private carrier single-source leasing since in each case the private carrier would have to establish an employment relationship with the drivers. Thus, the normal incidents of employment would attach to the relationship. One of the benefits of leasing is to avoid the cost and other undesirable aspects of directly employing drivers. While it may be that the control requirements established by the Commission would invariably lead to a conclusion by the National Labor Relations Board that the shipper is, in fact, the employer, this is a far cry from holding that an employment relationship must exist.

conclusion is that it is the indicia of control which the Commission looks to in evaluating single-source leasing arrangements.

In accordance with the test adopted in *Single-Source Leasing*, the Commission will now focus on the elements of *control, responsibility, and performance of the key organizing and management functions of a transportation company*. Oftentimes, the Commission draws a parallel between the indicia of control which exist in a true employment context and the indicia of control existing in the particular case under review. *See Personnel Services, supra; Heavy Equipment Rental Co., Investigation*, 98 M.C.C. 365 (1964). It is probably the comparative use of the term, "true employment relationship" which has led the Petitioners to conclude that an employment relationship between the shipper and the equipment operator is essential. Their argument is misplaced; it is the indicia of control which are essential.

Nevertheless, assuming *arguendo* that the Commission had required, in its past decisions, as Petitioners would have us believe, that there be a valid employment relationship in all cases of single-source leasing and that the new policy test significantly alters that requirement, this would not invalidate the new test. Fatal to Petitioners' quest for review is this Court's acknowledgment in *Drum* that the demarcation between private and for-hire carriage is committed to the Commission's expertise and that any test established by the Commission is necessarily an evolving one. *Drum* is not and was never intended to be a limitation on the Commission's ability to adopt a new criterion for defining private carriage. If this is the case, and it is, then it is absurd to argue that the Eleventh Circuit's decision conflicts with *Drum*. In fact, the Commission has done nothing more than the Supreme Court in *Drum* stated the Commission has the authority to do.

NARUC argues that the Eleventh Circuit's decision conflicts with *Drum* inasmuch as the ICC must establish "practical and enforceable limitations upon private shippers." NARUC Pet. App. at 13. This disingenious argument is nothing more than NARUC's state enforcement argument with a different twist. Such a thinly disguised attempt to create a conflict is not

entitled to serious consideration and should be summarily dismissed.

Ryder does not raise a true conflict argument. Instead, it contends that the ICC was bound by *Drum* and that *Single-Source Leasing* rejects *Drum*. Ryder is in error on both points.

Petitioners labor under the misguided assumption that the ICC is bound by the policies of the past. Respondents maintain, however, that an administrative agency is not and should not be bound by the principle of *stare decisis* when confronted with significant changes in the industry which it regulates. *If the "Drum" decision makes anything clear, it is that the test fashioned by the Commission is an evolving one.*

The Commission's authority and obligation to reassess and revamp outmoded policy are not open to question. In *American Trucking Associations, Inc.* v. *Atchison, Topeka and Santa Fe Railway Co.*, 387 U.S. 397, 416 (1967), this Court concluded:

> [T]he Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. . . . In fact, . . . this kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

Judicial deference to the Commission's discretion in determining the need for change was evident in *American Trucking Associations, Inc.* v. *United States*, 602 F.2d 444 (D.C. Cir. 1979), wherein, the Court stated:

> In creating the ICC it was the "fond hope" of Congress that the Commission would "bring to . . . [its] work the expert's familiarity with industry conditions which members of the delegating legislatures cannot be expected to possess" and that "the Commission would exercise its expertise and interpret . . . in future times with an eye toward prevailing conditions in the transportation market."

Id. at 449. The Commission's duty to reassess outdated policy was more recently affirmed in *Mercury Motor Express, Inc.*, wherein the former Fifth Circuit declared:

> To imprison the Commission in a policy formulated more than forty years ago when the transportation industry was in its infancy would effectively thwart its proper enforcement of the National Transportation Policy. To the contrary, it has been directed to administer the Act in light of the nation's changing needs:

Id. at 319. Therefore, the response of the Commission in *Single-Source Leasing* to the ever-increasing need for energy efficiency, productivity and competition in the trucking industry was well within the scope of the Commission's authority.

On this point, the appellate court concluded, after review of all relevant portions of the record, "that the new policy is a rational response to the Commission's findings of changed circumstances." *Ryder, supra* at 1389.

CONCLUSION

On the basis of the foregoing, the Petitions for Writ of Certiorari should be denied.

Respectfully submitted,

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